United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

B P/S

74-1232

IN THE

United States Court of Appeals

FOR THE SECOND CIRCUIT

SPANG INDUSTRIES, INC., FORT PITT BRIDGE DIVISION,
a corporation,
Appellant,

v.

THE AETNA CASUALTY AND SURETY CO.,
a corporation.

TORRINGTON CONSTRUCTION CO., INC.,

v.

SPANG INDUSTRIES, INC., FORT PITT BRIDGE DIVISION,
a corporation,
Appellant,

v.

SYRACUSE RIGGING CO., INC.

APPEAL FROM THE JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF NEW YORK AT NOS. 72-CV-22 AND 72-CV-463 CIVIL ACTIONS.

BRIEF FOR APPELLANT

WILLIAM T. MARSH,
Brugh Avenue,
P. O. Box 751,
Butler, Pa. 16001,

EARL F. GALLUP, JR.,
McNAMEE, LOCHNER, TITUS & WILLIAMS,
75 State Street,
Albany, N. Y. 12201,

Attorneys for Appellant.

BATAVIA TIMES, APPELLATE COURT PRINTERS
EDWARD W. SHANNON---SENIOR REPRESENTATIVE
1701 PARKLINE DR., PITTSBURGH, PA. 15227
HAROLD L. BERKOBEN, REPRESENTATIVE
412-881-7462

TABLE OF CONTENTS.

TABLE OF CITATIONS.

In the

United States Court of Appeals

For the Second Circuit

No. 74-1232.

SPANG INDUSTRIES, INC., FORT PITT BRIDGE DIVISION, a corporation,

Appellant,

v.

THE AETNA CASUALTY AND SURETY CO., a corporation.

TORRINGTON CONSTRUCTION CO., INC.,

v.

SPANG INDUSTRIES, INC., FORT PITT BRIDGE DIVISION, a corporation,

Appellant,

v.

SYRACUSE RIGGING CO., INC.

Appeal from the Judgment of the United States District Court for the Northern District of New York at Nos. 72-CV-22 and 72-CV-463 Civil Actions.

BRIEF FOR APPELLANT

Statement of Issues Presented for Review.

1. In a contract case tried to the court without a jury, can one of the parties be held liable to the other for special

damages without (a) evidence and (b) a finding by the court that the party being held liable had knowledge, at the time of or prior to contracting, of special circumstances making probable special loss?

2. What is the proper rule for the application, as between principal and interest, of partial payments on account of an outstanding indebtedness?

3. Does Rule 58 of the Federal Rules of Civil Procedure set forth only suggested procedures, to be followed or not followed in the discretion of each district court and clerk, or is that Rule mandatory?

Statement of the Case.

Appellant is Spang Industries, Inc., Fort Pitt Bridge Division (herein called "Fort Pitt"). In 1970 Fort Pitt, as a subcontractor to appellee Torrington, fabricated, furnished and erected the structural steel for a bridge on a certain highway project in upper New York State north of Albany near the Vermont border, for a total subcontract price of $132,274.73. Appellees are the general contractor on the project, Torrington Construction Co., Inc. (herein called "Torrington"), and the surety on the general contractor's labor and material payment bond, The Aetna Casualty and Surety Co. (herein called "Aetna"). After Fort Pitt completed its subcontract work, Torrington paid only $60,000 of the price and refused to pay the balance, claiming an unspecified amount as damages on account of alleged delays in Fort Pitt's work. Much later, in 1972, Torrington made two further payments on account of $20,000 and $28,983.92 respectively.

Fort Pitt commenced the proceedings by suing Aetna in July 1971 in the Western District of Pennsylvania to recover

$72,274.73, the balance then due on its subcontract with Torrington, plus interest. That action was transferred to the Northern District of New York under 28 U.S.C.A. § 1406(a). Meanwhile, Torrington commenced its suit in December 1971 by summons in the New York State Supreme Court for Washington County. In September 1972 Torrington served its complaint seeking damages of $23,290.81 allegedly incurred by reason of alleged delay in the shipment, delivery and erection of the steel; Fort Pitt removed the case to the federal court at Albany; and the two cases were consolidated, none of the parties having demanded a jury trial.* The cases were tried non-jury before Judge James S. Holden, visting from Vermont, on May 29-31, 1973. For some reason, the Torrington claim was tried first although it was filed second.

In September 1973 Judge Holden issued his Findings of Fact and Conclusions, in which he resolved all factual questions in favor of Torrington and awarded Torrington $7,653.57 in damages on its delay claim, which amount the Judge set off against the contract price. The Judge then allowed as an additional off-set, all payments which Torrington had made on account, regardless of when made, and struck a net balance due at November 12, 1970, of $15,636.55. Counsel for Torrington then prepared a form of judgment and the Clerk signed it without notice to counsel for Fort Pitt and without approval of the Court, and entered judgment in favor of Fort Pitt in the amount of $18,371.68 ($15,636.55 plus interest at 6% from November 12, 1970). Judge Holden denied Fort Pitt's post-judgment motions except to correct the rate of interest. Final judgment, as amended, was entered on December 13, 1973.

*Since Torrington's Complaint alleged delays not only in the delivery of the steel but also in the erection thereof, Fort Pitt joined its erection subsubcontractor, Syracuse Rigging Company, as a third party defendant. But no evidence was offered at trial of any delays in the steel erection, so Judge Holden dismissed the third party complaint. Fort Pitt does not appeal from that judgment.

On these appeals, Fort Pitt does not propose to take issue with Judge Holden's findings of fact, distasteful as they may be. The issues presented for review are questions of law, and the relevant facts necessary to a proper disposition of these issues are few and uncomplicated.

The general contract was awarded by the New York Department of Transportation on September 9, 1969 (R. 4a, 33a), and was to be completed on or before December 15, 1971 (R. 85a). In fact, Torrington completed the contract work in December 1970 (a full year early) and the project was formally accepted by the State by letter dated January 21, 1971 (R. 87a). The subcontract between Torrington and Fort Pitt provided that delivery of the structural steel was to be mutually agreed upon (R. 90a), and the Judge found that Fort Pitt agreed to ship the steel in early August 1970 but in fact shipped it in late August 1970, thereby breaching its contract. Although this conclusion ignores the realities of the heavy structural steel fabricating industry, we accept it for purposes of this appeal.

But the damages which the Judge awarded to Torrington were extra costs which Torrington claimed to have sustained in accelerating its work to complete the job in 1970 although it did not have to be completed until the end of 1971. In the words of Judge Holden, Torrington ran a "race against cold weather" and thereby incurred "attendant increased expenses" (R. 72a). Fort Pitt completed the erection of the bridge steel in the first week of October, 1970, and Torrington then proceeded to finish the job that same autumn. Torrington claimed that it incurred extra costs in doing so, and the Judge accepted the claim.

But the Judge made no finding that Fort Pitt knew or should have known, at the time of contracting, that Torrington was proposing to attempt to complete the job in 1970. Nor could he have made any such finding because there

was absolutely no evidence which would have supported it. Fort Pitt challenges whether it can be held liable for the damages awarded in the absence of such evidence and finding.

The subcontract between Torrington and Fort Pitt provided for payment of net cash thirty days from the date of invoices (R. 90a). Invoices were as follows (R. 93a-96a):

Invoice No.	*Date*	*Amount*	*Date Due*
1427	9/08/70	$107,802.90	10/08/70
1448	10/12/70	23,373.20	11/12/70
1491	11/30/70	1,104.13	12/30/70
Credit Memo		(5.50)	12/30/70
Total Contract Price		$132,274.73	

Torrington made the following payments to Fort Pitt (R. 97a-99a):

Check dated	
12/11/70	$ 60,000.00
2/04/72	20,000.00
9/07/72	28,983.92
Total	$108,983.92

The Judge simply applied all three payments to the contract balance as if they had all been paid on time, and allowed interest only on the net balance. The interest thus denied to Fort Pitt amounts to approximately $7,000. Fort Pitt tried to get the error corrected by post-judgment motions, but the Judge denied the motions, without oral argument, citing the well known rule of law (which had not been argued by either side) that acceptance of payment of the principal balance of an outstanding indebtedness extinguishes the debt and bars a sub-

sequent action to recover interest separately. That rule, however, has no application to partial payments on account.

The Judge's Order on the post-judgment motions states that Fort Pitt had not theretofore requested judicial enforcement of its absolute legal right to interest; this statement was not correct (R. 6a, 59a).

ARGUMENT.

1. Fort Pitt could not be held liable for the special damages awarded unless it had had knowledge, at the time of making the subcontract, of any special plans Torrington might have had for accelerating its work.

Although the amount which the lower court awarded to Torrington as damages is not particularly large, the principle involved in this Appeal, being one of the most elementary rules of contract law, is vitally important to the business of Fort Pitt as well as to all subcontractors and suppliers whose daily businesses are conducted in reliance on certain elementary principles of law.

The damages awarded to Torrington consisted of additional costs which Torrington supposedly sustained in order to expedite the job to completion in 1970 after the bridge steel had been delivered and erected. The Judge found, and we therefore must assume for purposes of this argument, that Fort Pitt committed a technical breach of contract by shipping the bridge steel two and three weeks later than the date on which Fort Pitt had stated that it expected to ship. But in the absence of special circumstances made known at the time of the contract, the measure of damages for such a breach would be limited to such general damages as could reasonably be

supposed to have been within the contemplation of the parties at the time they made their contract.

Hadley v. Baxendale, 56 Eng. Rep. 145 (1845);

Globe Refining Co. v. Landa Cotton Oil Co., 190 U.S. 540 (1903);

Chapman v. Fargo, 223 N.Y. 32, 119 N. E. 76 (1918);

Czarnikow-Rionda Co. v. Federal Sugar Refining Co., 255 N.Y. 33, 173 N.E. 913 (1930);

Keystone Diesel Engine Co. v. Irwin, 411 Pa. 222, 191 A.2d 376 (1963);

Jones Memorial Trust v. Tsai Investment Services, Inc., 367 F. Supp. 491, 499 (S.D.N.Y. 1973).

The *Chapman v. Fargo* case, for example, was an action against a carrier for damages resulting from delay in the delivery of particular motion pictures. The trial court had found in favor of the plaintiff and had awarded special damages consisting of the profits which the plaintiff supposedly had lost by not being able to show the movies when plaintiff had planned to show them. The Court of Appeals reversed the judgment, holding that the defendant could not be held liable for the special damages which were awarded by the trial court without having been made aware at the time of the contract that the plaintiff had made certain plans based upon the arrival of the films at a certain time, and that in case of non-arrival at that time, these plans would be destroyed in all probability, causing certain damage. The Court of Appeals cited a myriad of cases supporting its decision, and discussed *Hadley v. Baxendale* at length with approval.

Another way of expressing the elementary rule of all these cases is that since contract law is a matter of enforcing the mutually manifested or implied intention of the parties, neither party can be held to have assumed a risk of which he

had neither knowledge nor reason to know.* In the *Globe Refining* case, *supra,* Mr. Justice Holmes expressed the concept in his usual lucid fashion as follows (190 U.S. at page 543):

> "When a man makes a contract . e incurs by force of the law a liability to damages, unless a certain promised event comes to pass. But unlike the case of torts, as the contract is by mutual consent, the parties themselves, expressly or by implication, fix the rule by which the damages are to be measured ... [A] man never can be absolutely certain of performing any contract when the time of performance arrives, and in many cases he obviously is taking the risk of an event which is wholly or to an appreciable extent beyond his control. The extent of liability in such cases is likely to be within his contemplation, and whether it is or not, should be worked out on terms which it fairly may be presumed he would have assented to if they had been presented to his mind."

Thus, unless particular special circumstances are shown to have formed the basis of a bargain, an injured party is entitled to recover only such general damages as were reasonably foreseeable at the time of contracting as the ordinary and natural consequence of non-performance or breach. But if the breaching party is to be held liable for special damages arising out of special circumstances (such as a unilateral plan to accelerate Torrington's own schedule of its own work), the injured party must prove that the other party had knowledge of the special circumstances making probable special loss and that the breaching party had this knowledge or should have had this knowledge at the time of or prior to contracting. This rule was set forth unequivocally and the authorities reviewed by the New York Court of Appeals in the *Czarnikow* case, *supra,* in the following paragraph (173 N.E. at 916):

> "Notice of the special circumstance which may cause special damage to the buyer must be had by the seller at

* *Cf. Lanza v. Drexel & Co.*, 479 F.2d 1277 (2d Cir. 1973).

> the very time when he contracts to sell. There must be notice 'at the time of or prior to contracting'. Chapman v. Fargo, *supra*. 'No notice to the seller thereafter would increase his liability.' Per Lehman J., in Goldston v. Wade, (Sup.) 123 N.Y.S. 114, 115. 'The consequences must be contemplated at the time of the making of the contract.' Per Holmes, J., in Globe Refining Co. v. Landa Cotton Oil Co., *supra*. 'No doubt notice subsequent to the formation of the contract, though prior to the breach, is insufficient.' Williston on Contracts, § 1357. The seller must have 'notice when the contract was entered into that the loss in question would be a natural consequence of the breach.' Id. § 1355."

It is possible that Torrington will argue on this appeal that certain communications after the date of the subcontract should have alerted Fort Pitt to Torrington's plan to accelerate its work to completion. But whether or not the letters relied upon did or did not communicate Torrington's intentions is totally immaterial. One cannot make a contract and then unilaterally, at a later date, enlarge the liability of the other party. The above quotation from the *Czarnikow* case, which represents the common law of all jurisdictions, is unequivocal on this point. This principle is also emphasized by Mr. Justice Holmes in the *Globe Refining* case.

In this case Fort Pitt knew at the time of contracting that the completion date for the general contract work was December 15, 1971, because Fort Pitt obtained the State's plans and specifications in order to bid the steel on the job. But the record contains no suggestion that Fort Pitt had any knowledge that Torrington was supposedly planning to complete the job in 1970, a full year or more early. Although the trial court made no finding that Fort Pitt had any such knowledge, the court held Fort Pitt liable for "increased" expenses which it found to be attendant to a "race against cold weather" by Torrington to complete the job.

The point is that Fort Pitt cannot be held liable for the expenses of any race run by Torrington unless Fort Pitt knew or

had reason to know, at the time it contracted to furnish and erect the bridge steel, that Torrington was planning to run such a race.

By way of illustrating this point, let us suppose that the facts of this case occurred in 1971 instead of 1970; all the dates are identical except that the year is 1971 instead of 1970. In that case, Torrington's claim would be meritorious to the extent that work which could not be done until the bridge steel was up had to be expedited in order to complete the job on time. Additional expenses incidental to such expediting would be general damages if incurred in 1971 because Fort Pitt would be presumed to have known that Torrington was going to have to accelerate its work and race the weather in order to finish the job on time.

But the facts did not occur in 1971; they occurred in 1970, and therefore the damages awarded were special damages because Fort Pitt had no reason to suspect that Torrington was going to try to finish the job in 1970. Therefore, even if we accept the trial court's conclusion that Fort Pitt committed a technical breach of contract by shipping the bridge steel later than it had said it expected it to be shipped, the damages awarded are not the proper measure of damages.

It may be that if Torrington had produced evidence of direct damages, such as the job being shut down for a period of time waiting for bridge steel, the expenses of such direct damages would be properly chargeable to Fort Pitt under the trial court's finding of liability. But Torrington did not attempt to prove any direct damages, which is understandable because far from shutting the job down while supposedly waiting for steel, Torrington continued to work the job hard on an overtime basis throughout the months of August and September 1970. Having failed to prove any direct damages, Torrington is not entitled to any award.

Kaufmann v. Diversified Industries Inc., 460 F.2d 1331 (2d Cir. 1972) cert. denied 409 U.S. 1038.

2. Fort Pitt is entitled, as a matter of law, to a proper allowance of interest.

The total contract price due to Fort Pitt for the structural steel which it fabricated, delivered and erected for Torrington on Torrington's general highway contract was $132,274.73, payable net 30 days from date of invoice. Invoices were rendered as follows:

Invoice No.	*Date*	*Amount*	*Date Due*
1427	9/08/70	$107,802.90	10/08/70
1448	10/12/70	23,373.20	11/12/70
1491	11/30/70	1,104.13	12/30/70
Credit Memo		(5.50)	12/30/70
Total Contract Price		$132,274.73	

The credit memo was for the purpose of conforming the amount invoiced to the total "pay weight" as established by the New York State Department of Transportation.

By check dated December 11, 1970, Torrington paid $60,000 on account but refused to pay any part of the remaining balance. When six months passed without any movement, plaintiff filed suit against Aetna (Torrington's bonding company) for the balance due of $72,274.73, plus interest. Later, Torrington paid $20,000 on account by check dated February 4, 1972, and another $28,983.92 by check dated September 7, 1972.

Judge Holden, in his Order denying Fort Pitt's post-trial motions, made the statement that Fort Pitt had not previously requested or demanded interest on payments made by Torrington after suit was filed but before trial. First of all, whether or not Fort Pitt did or did not make any such demand is immaterial because Rule 54 (c) of the Federal Rules of Civil Procedure requires that every final judgment shall grant the relief to which the party in whose favor it is rendered is

entitled, even if the party has not demanded such relief in his pleadings. An analogous situation was *United States v. Walsh*, 240 F. Supp. 1019 (N.D.N.Y. 1965) (a case which was cited to the trial court here). That was a Miller Act claim which was referred to arbitration. In the proceeding to enforce the arbitration award, the surety company contended that no interest should be awarded because the plaintiff had not submitted interest as one of the issues placed before the arbitrators. The Court held that this was immaterial because (p. 102):

> "... under the law of New York, statutory and case interpretations, a party in a contract action for liquidated damages is entitled to interest as a matter of law and right from the date the cause of action arose."

Moreover, Fort Pitt did demand such relief in its pleadings. It is not in the complaint against Aetna because Torrington had not yet made the payments. But when Torrington filed its complaint in 72-CV-463, Fort Pitt was compelled to file a counterclaim, in which interest on the late payments was specifically demanded (R. 59a). Perhaps the Court was referring to the Requests for Findings. It is true that Fort Pitt did not submit a requested finding summarizing and totalling the account, but the reason was that counsel for Fort Pitt believed that the amount of interest would be fixed separately at the settlement of the judgment, as is the procedure in the Western District of New York. Again, however, the content of Requests for Findings is immaterial because requests are unnecessary under Rule 52.

The question, then, is how should the partial payments of $20,000.00 in February 1972 and $28,983.92 in September 1972 have been applied. The trial court held that Torrington should get full credit for the payments as if they had been made in November or December 1970. Such a ruling clearly penalizes any creditor who accepts a partial payment, and if it were to be affirmed by this Court, the result would be to deter

creditors from accepting partial payments and to increase litigation.

In support of its holding, the trial court cited the case of *Crane v. Craig*, 230 N.Y. 452, 130 N.E. 609 (1921), where the New York Court of Appeals applied the general rule that since the right to interest is an adjunct to the right to receive the principal debt, acceptance of payment of the principal debt extinguishes the debt and bars a subsequent action by the creditor for interest.* This is a salutary rule because its effect is to reduce litigation by eliminating cases where the sole relief sought is interest on a debt that has been paid. But the rule only applies where the entire principal is paid.

The law regarding the proper application of partial payments on account is well summarized in the encyclopedias (See. e.g. 70 C.J.S. Payment § 75 and 47 C.J.S. Interest § 66), and it was exhaustively reviewed by this Court in *Ohio Savings Bank & Trust Co. v. Willys Corp.*, 8 F.2d 463 (2d Cir. 1925) at pages 466-67 as follows:

> "This brings us to inquire into the rules applicable to the payments already made and those which remain to be made because of the interest which may be due thereon. In a case in the Supreme Court of the United States in 1839, Story v. Livingston, 13 Pet. 359, 371 (10 L. Ed. 200), Mr. Justice Wayne, writing for the court, stated the rule as follows:
>
> 'The correct rule, in general, is, that the creditor shall calculate interest, whenever a payment is made. To this interest, the payment is first to be applied; and if it exceed the interest due, the balance is to be applied to diminish the principal. If the payment fall short of the interest, the balance of interest is not to be added to the

* Whether payment after suit has been entered bars the recovery of interest was not decided by *Crane v. Craig*, so the case is not authority for the result decreed by the trial court in this case, but this distinction is of no moment because the entire principle is inapplicable to partial payments.

principal so as to produce interest. This rule is equally applicable, whether the debt be one which expressly draws interest, or on which interest is given in the name of damages.'

"And that is understood to be the rule in all the federal courts before and since that time. Smith v. Shaw, 2 Wash. C. C. 167, Fed. Cas. No. 13,107; Russell v. Lucas, Hempst, 91, Fed. Cas. No. 12,156a; Harlan v. Houston, 258 F. 611, 170 C.C.A. 65. The question came before Chancellor Kent in 1814, and was one of the first cases decided by him after he became chancellor. The case was that of State of Connecticut v. Jackson, 1 Johns. Ch. (N. Y.) 13, 7 Ann. Cas. 471. He stated the rule as follows:

'The rule for casting interest, when partial payments have been made, is to apply the payment, in the first place, to the discharge of the interest then due. If the payment exceeds the interest, the surplus goes towards discharging the principal, and the subsequent interest is to be computed on the balance of principal remaining due.'

"In 1835 the question came before Chancellor Walworth in New York in Stone v. Seymour, 15 Wend. 19, 23. He states that:

'Some of the fundamental principles of the civil law appear to have been adopted everywhere, and to admit of no doubt: * * * (3) If a partial payment is made, on account of debts, one part of which debts consists of the principal and another of the interest or compensation due for the use of the capital of such debts, so much of the payment as is necessary to satisfy the interest, or arrears then due, shall be first applied for that purpose, and the residue only shall go to reduce the amount of the principal debt. These rules prevailed in the Roman or civil law, and are now the settled law of France, Spain, Holland, Scotland, England, and the United States. * * * The last of these principles is also supported by all of the English and American cases in which the rule has been settled as to the computation of interest, when partial payments have been made upon accounts or demands

drawing interest, and where both principal and interest were due at the time of such payments.'

"We shall not review the New York cases which have since been decided. We content ourselves with a reference to Haffey v. Lynch, 193 N.Y. 67, 71, 85 N. E. 817 (1908), in which Chief Judge Cullen, speaking for a unanimous court, quotes approvingly the doctrine laid down by Chancellor Kent in Connecticut v. Jackson, supra, and hereinbefore set forth. In Haffey v. Lynch many of the New York cases are cited. And such is recognized in the courts of the several states to be the general rule.

[citing 33 cases]

"The rule in the United States on this subject prevails also in England."

It is, of course, true that a debtor has the ability to direct how a payment is to be applied, and if the creditor accepts the payment, he accepts it with the condition attached. 70 C.J.S. Payment § 55. But the payments made by Torrington had no conditions attached. Therefore, the trial court should have followed the general rule of the *Willys* case, *supra.* See *Helvering v. Drier,* 70 F.2d 501 at 503 (4th Cir. 1935). *Cf. First Nat. Bank & Trust Co. v. Baker,* 124 Conn. 577, 1A. 2d 283 at 289 (1938). In the more recent case of *Lusteg v. United States,* 138 F. Supp. 870 (Ct. Cl. 1956), the court held at page 873 that it is a

"... fundamental rule that partial payments shall first be credited to interest and then to principal, unless otherwise specified."

The applicable rate of interest to which Fort Pitt is entitled was 7-1/2% through August 31, 1972, and 6% thereafter. C.P.L.R. § 5004; *Trans World Airlines Inc. v. Hughes,* 449 F.2d 51 at 80-81 (2d Cir. 1971) rev'd. on other grounds 409 U.S. 363 (1972).

3. The judgment against Aetna should be increased to the proper amount and revised in form.

Fort Pitt in these proceedings has consistently been looking to the assets and credit of The Aetna as surety on Torrington's labor and material payment bond. In fact, Fort Pitt filed a counterclaim in the action in which Torrington is the plaintiff only as a precaution against the remote possibility that a court might construe the absence of a counterclaim against Torrington as a waiver in favor of Aetna.

The liability of Aetna as surety is co-extensive with that of Torrington, including the liability for interest. *Commonwealth v. Continental Casualty Co.*, 429 Pa. 366, 240 A. 2d 493 (1968); *United States v. Walsh*, 240 F. Supp. 1019 (N.D.N.Y. 1965). The latter case was a Miller Act case; ours is not, so notice to the surety is immaterial, but the notice letter to Aetna dated November 13, 1970, is in the record (R. 101a).

The trial court, in the Findings of Fact and Conclusions, directed the entry of judgment against Aetna in the same amount as against Torrington. The Clerk subsequently entered an ambiguous judgment on a form prepared by counsel for Torrington and not approved by the court. When Fort Pitt was notified of the entry of judgment and the form thereof, Fort Pitt filed motions not only to correct the amount of the judgment but also to correct the form thereof. In its Order on these motions, the trial court referred only to the counterclaim in the case in which Torrington is the plaintiff. No reference at all was made to the form of judgment. The notice from the Clerk of the entry of an amended judgment on December 13, 1973 does not indicate that the judgment against Aetna was amended.

This point is relatively insignificant compared to the major issues on this appeal. But there should have been separate judgments in each case, as required by Rule 58; the form of the judgments should have been either prepared by the trial court or prepared by the clerk and approved by the court,

also as required by Rule 58; and the form of judgment should not have been ambiguous. The Rules of Civil Procedure have been in force for a sufficient number of years that there can be no excuse for not following them. If every district court and every clerk's office is going to be permitted to operate differently, then the Rules might as well be abolished.

Fort Pitt is concerned primarily with the judgment against Aetna and specifically requests that the mandate of this Court direct the entry of judgment not only in the correct amount as set forth in the preceding section of this brief, but also in a correct, separate, unambiguous form.

Conclusion.

At the time of the subcontract between the parties, Fort Pitt had no knowledge of Torrington's plans for prosecuting and completing the contract, except by implication from the fact that the State's Proposal Form called for the project to be finished by December 15, 1971. The trial court made a finding that Torrington was planning all along to try to finish the job in 1970, and we do not challenge that finding although the evidence is most strongly to the contrary. But this was a unilateral plan not communicated to Fort Pitt so as to form part of the basis of the bargain of the subcontract. In order to charge Fort Pitt with the additional expenses supposedly incurred by Torrington in its race against the weather to finish the job in 1970, Torrington would have had to communicate its plan to Fort Pitt, *at the time of the subcontract,* under such circumstances that Fort Pitt would have known that it was accepting the subcontract with the special condition attached.

The liabilities of one party to a contract cannot be enlarged by the unilateral decisions, plans and actions of the other. This principle is of such vital importance to Fort Pitt that it would have appealed, regardless of the amount of special damages awarded to Torrington, because the lower court has in effect held that one party can unilaterally enlarge its own

contract rights. This is wrong, and if such a decision is allowed to stand, all suppliers and subcontractors will be at the absolute mercy of their customers. Customers of suppliers and subcontractors have very little mercy.

The judgments of the lower court should be reversed and the causes remanded with instructions to restate the account as follows:

	Principal	*Interest*
Invoiced 9/8/70	$107,802.90	
Invoiced 10/12/70	23,373.20	
Due at 11/12/70	131,176.10	
Interest to 12/11/70 @ 7-1/2%		$ 819.85
Due at 12/11/70	131,176.10	819.85
Paid 12/11/70	(59,180.15)	(819.85)
Balance at 12/11/70	71,995.95	-O-
Interest to 12/30/70 @ 7-1/2%		300.00
Invoiced 11/30/70 (less credit memo)	1,098.63	
Balance at 12/30/70	70,094.58	
Interest to 2/7/72 @ 7-1/2%		6,075.98
Due at 2/7/72	73,094.58	6,375.98
Paid 2/7/72	(13,624.02)	(6,375.98)
Balance 2/8/72	59,470.56	-O-
Interest to 8/31/72 @ 7-1/2%		2,491.82
Interest to 9/7/72 @ 6%		69.38
Due at 9/7/72	59,470.56	2,561.20
Paid 9/7/72	(26,422.72)	(2,561.20)
Balance at 9/8/72	$ 33,047.84	-O-

Interest after 9/8/72 should be added at the rate of $5.51 per day, computed at the New York legal rate of 6%.

The lower court should be directed to enter separate judgments in each case, in an unambiguous form, following the procedure of Rule 58.

Respectfully submitted,

WILLIAM T. MARSH,
Brugh Avenue, P. O. Box 751,
Butler, Pa. 16001.

EARL F. GALLUP, JR.,
McNamee, Lochner, Titus &
Williams,
75 State Street,
Albany, N. Y. 12201,
Attorneys for Appellant.

AFFIDAVIT OF SERVICE BY MAIL

State of New York)
County of Genesee) ss.:
City of Batavia)

RE: Spang Industries, Inc. etc.
v
Aetna Casualty & Surety Company et al
Docket No. 74-1232

I, Louis Cecere being duly sworn, say: I am over eighteen years of age and an employee of the Batavia Times Publishing Company, Batavia, New York.

On the 19 day of July, 1974 I mailed 5 copies of a printed Appendix and ~~xx~~ Brief the above case, in a sealed, postpaid wrapper, to:

McClung, Peters & Simon, Esqs.

State Bank Building

Albany, New York 12207

ATTENTION: Homer E. Peters, Esq.

at the First Class Post Office in Batavia, New York. The package was mailed Special Delivery at about 4:00 P.M. on said date at the request of:

William T. Marsh, Esq.

Brugh Avenue, P.O. Box 751, Butler, Pa. 16001

Louis Cecere

Sworn to before me this

19 day of July, 1974

Monica Shaw

MONICA SHAW
NOTARY PUBLIC, State of N.Y., Genesee County
My Commission Expires March 30, 1975